IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.449 OF 1999.

Margaret James Bol,]	
aged 27 yrs. Occ : Student,]	Appellant
having her address at Sudan]	(Original
Council of Churches,]	Accused No.1)
Sudan Khartoum, P.O. Box 969]	
(Presently lodged in Yerwada]	
Central Prison, Pune.]	
versus.	
1] The Intelligence Officer]	
Narcotic Control Bureau]	Respondents.
Mumbai.]	(Original
2] The State of Maharashtra]	

Mr.S.B.Keswani with Pradeep Hingorani and Mr.Y.R.Israni for the appellant.

Mr.D.N.Salvi, for Respondent No.1.

Mr.D.R.More, APP, for the State.

CORAM : D.G.DESHPANDE,J.

DATED : 19th August 2004.

ORAL ORDER

1. Heard Mr.Keswani and Mr.Hingorani for the appellant; Mr.Salvi for Respondent No.1 and Mr.More, APP, for the State.

2. The accused, who was a student, was one of the 11 accused in a case under the NDPS Act. The allegations against the accused was that when her premises were raided by the officers of Narcotic Cell one plastic bag was found on a cupboard inside a kitchen containing 4 kg. brown powder and 75 drug capsules, kept in polythene bag , were recovered from the cavity of the sofa back rest which was in the living room. The powder recovered from the kitchen and sofa back rest was tested with testing kit and it tested positive for brown powder. Some cash was also recovered and the Chemical Analyser opined that the samples sent containing Heroin (Diacetyl Morphine) and hence covered by Section 2 (xvi)(e) of the NDPS Act. The trial Court has accepted the story of the prosecution and convicted this accused only out of the 11 accused and acquitted other ten accused.

3. The crucial question in this case is, whether this accused was in conscious exclusive possession of the narcotic drugs found in her room. It is true that she had this room on leave and licence. It is also true that this quantity was recovered from the house in her occupation and possession. But even then the question is of conscious exclusive possession. Panchanama, at the time of raid, is a most vital document that will throw light on this aspect of the case of the prosecution. The panchanama is dated 10.1.1996. It is at Exhibit 27 and on record page 1199 in Volume V. Two panchas viz. Augustin Misquetta and Hilary Mathias were present. They stated that when they went to the room of the accused and knocked the door, an african lady opened the door. The officers disclosed their identity and the african lady gave her name as Margaret James. Thereafter they entered the room. At that time, Mary Anthony Tikimo - an african lady, Clemet Ben, Ding, Benamin James, Chuks Etete all african men were present. Thereafter the raiding party entered the kitchen and the officers recovered a plastic

shopping bag from the kitchen and the said back was lying on the steel cupboard in the kitchen. Thereafter another shopping bag was recovered from the cavity in the back rest of the sofa-cum-bed.

4. The first thing that is clear from the panchanama is that none of the two bags were hidden or concealed. One bag was lying on the steel cupboard and the other was in the cavity of sofa-cum-bed. Secondly, at the time of raid four persons were present. One of them was lady and all were africans. In this background, therefore, the counsel for the accused made only one submission and, that is, whether it could be said that the prosecution has proved that this accused No.1/appellant was in conscious exclusive possession of the articles.

5. The learned APP, on the other hand, contended that though the four africans persons who were found in the room were also accused in that case along with others and since they are acquitted, the burden of explaining the possession would shift to the present accused because of the presumption against the accused.

6. It is difficult to accept this submission Merely because other accused have been acquitted is no ground to assume that this accused was in conscious possession. If the four persons were there along with the present accused, any of them might have brought these articles in her house and kept. Therefore, the place and the manner in which the articles were kept, carry importance. One bag was found in kitchen lying on the steel cupboard and another bag was found in the cavity of the sofa-cum-bed. There is nothing in the panchanama to show that the cavity was not visible or it was covered with something or it was inaccessible.

7. Therefore, it may be that this accused was occupying the room on leave and licence at the relevant time. It may be that she opened the door and was present there in the room. But the fact that four other persons were also found in the room and two polythene bags were found in the manner stated above. Therefore, a strong doubt creates about conscious exclusive possession of the accused. Further there is evidence on record to show that sofa belonged to the landlady

because there are two leave and licence agreements and in both of them the fact is mentioned that the room was given to the accused along with furnitures.

8. Mr.Salvi for Respondent No.1 contended that once the leave and licence agreement is proved, then the possession of the accused over the premises stands proved. That may be generally proved, but the question is not of possession of the room but the question is of possession of the contraband articles and when at the time of raid four other persons were present, then it cannot be said that the prosecution has succeeded in proving that it was this accused alone who was in conscious exclusive possession of the articles.

9. The room is two room tenements; a hall and a kitchen. My attention was also drawn by Mr.Keswani to the first statement of the present accused recorded by the police on the same day and he pointed out that not a single question was asked to her about the narcotic drug found in her room. This, according to him, is a lacuna in the prosecution case. The trial Court has not given

due weightage to this important aspect of the matter and came to a wrong conclusion about the guilt of the accused.

10. Since one point was argued by Mr.Keswani, I am not considering other aspects of the matter which were not pressed before me. However, on the single point of failure of the prosecution to prove conscious exclusive possession, this appeal is required to be allowed. Hence, the appeal is allowed. The conviction of the accused under Section 21 r/w Section 8(c) of the NDPS Act and under Section 25 r/w Section 8(c) of the NDPS Act is set aside. She is acquitted of the offences. She should be set at liberty forthwith if not required in any order matter. Her passport to be returned to her immediately.

[D.G.DESHPANDE]

19/08/2004. JUDGE.